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Before the  
Federal Communications Commission  
Washington, D.C. 20554

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

In the Matter of )  
 )  
Implementation of Section 309(j) )  
of the Communications Act )  
Competitive Bidding )  
 )

PP Docket No. 93-253

REPLY COMMENTS OF  
THE INSTITUTE FOR PUBLIC REPRESENTATION  
AND  
OFFICE OF COMMUNICATION OF  
THE UNITED CHURCH OF CHRIST

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## SUMMARY

The Institute for Public Representation ("IPR") and the Office of Communication of the United Church of Christ ("OC/UCC") continue to support the preferences for minorities and women in the allocation of licenses for Personal Communications Services ("PCS"). Our reply comments focus on the constitutionality of the preferences for minorities and women proposed by the Commission in the Notice in response to a mandate by Congress. The proposed preferences are a permissible means of achieving the constitutionally valid goals of promoting economic opportunity for minorities and women, remedying past and continued discrimination against minorities and women, and promoting diversity of ownership and viewpoints.

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The Institute for Public Representation ("IPR") and the Office of Communication of the United Church of Christ ("OC/UCC") hereby submit reply comments in response to the Commission's Notice of Proposed Rule Making, In the Matter of Implementation of Section 309(j) of the Communications Act Competitive Bidding, PP Docket No. 93-253, FCC 93-455 (released October 12, 1993), 58 Fed. Reg. 53,489 (1993) (hereinafter, the "Notice").

IPR is a public interest law firm and clinical program at Georgetown University Law Center. In 1981, IPR merged with Citizens Communications Center, another public interest organization with a longstanding commitment to diversity in media and broad access to communications resources. Our Citizens Communications Center project has represented minorities, women and other underrepresented groups in FCC rulemakings and in litigation before the federal courts concerning minority

preferences and other procedures to ensure the participation of a wide range of interests in radio, television, telephone systems and other new technologies.

OC/UCC is an instrumentality of the United Church of Christ, a Protestant denomination of 1.65 million members nationwide. OC/UCC has consistently supported diversity of viewpoints in the marketplace of ideas in the course of its twenty-five year history as a public interest advocate.

Congress required that the Commission provide small businesses, rural telephone companies and businesses owned by women and minorities (collectively, "Designated Entities") with "the opportunity to participate" in the provision of spectrum-based services".<sup>1</sup> The Notice proposed certain preferential treatment for these Designated Entities and requested comments on a constitutionally permissible manner in which to fulfill that congressional mandate. These reply comments focus solely on the constitutionality of preferences for minorities and women in the context of the Commission's issuance of licenses for Personal Communications Services ("PCS").

The advent of PCS presents the Commission with a challenge in the regulation of a technology that is still developing and that will eventually encompass content-based services over which the licensee may exercise editorial control<sup>2</sup> in addition to the

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<sup>1</sup> Notice at 22.

<sup>2</sup> See American Personal Communications Press Release (July 22, 1993) (attached).

transmission of voice and data provided by others. The Notice proposed a set-aside of two blocks in the broadband PCS services for which only Designated Entities will be allowed to bid. Additionally, the Commission proposed the use of preferential payment terms, tax certificates and bidding preferences for Designated Entities.<sup>3</sup> IPR and OC/UCC continue to support the use of these preferential devices to promote economic opportunity for minorities and women, to remedy past and continued discrimination against minorities and women in the communications industry and to promote a diversity of ownership and viewpoints. For the reasons set out below, we believe the preferential treatment, mandated by Congress and proposed by the Commission as a method of achieving these goals, is constitutionally permissible.

**THE COMMISSION'S PREFERENTIAL TREATMENT OF MINORITIES AND WOMEN IS CONSTITUTIONALLY PERMISSIBLE**

IPR and OC/UCC disagree with the position asserted by the Association of Independent Designated Entities that although the inclusion of businesses owned by minorities and women as Designated Entities "might be desirable as an abstract proposition, the judicial baggage which such preferences carry could risk striking down the preferences in toto."<sup>4</sup> Preferential treatment of minorities and women by the Commission

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<sup>3</sup> Notice at 22.

<sup>4</sup> Association of Independent Designated Entities ("AIDE") Comments at 3.

at the direction of Congress is well within Congress' broad remedial powers<sup>5</sup> and, under existing law, is constitutionally permissible.

Metro Broadcasting, Inc. v. FCC, 497 U.S. 547 (1989), reaffirmed the use of intermediate scrutiny, when evaluating benign race-conscious measures mandated by Congress, that was first applied by the majority in Fullilove v. Klutznick, 448 U.S. 448 (1979). Metro Broadcasting involved minority preference policies adopted by the Commission to promote diversity in broadcasting. The preferences allowed for an enhancement for minority ownership in the comparative hearing procedure and a transfer to minority-controlled firms when a licensee's qualifications to hold a license comes into question. The Court deferred to Congress' and the Commission's expertise and determinations regarding the historical dearth of minority participation in the communications industry as well as the connection between increased diversity in broadcasting and increased minority ownership.<sup>6</sup> The Court chose to follow its

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<sup>5</sup> "It is fundamental that in no organ of government, state or federal, does there repose a more comprehensive remedial power than in the Congress, expressly charged by the Constitution with competence and authority to enforce the equal protection guarantees." Fullilove v. Klutznick, 448 U.S. 448, 483 (1979) (opinion of Burger, C.J.).

"It is beyond question therefore that Congress has the authority to identify unlawful discriminatory practices, to prohibit those practices, and to prescribe remedies to eradicate their continuing effects." Id. at 502 (opinion of Powell, J., concurring).

<sup>6</sup> "... deference was appropriate in light of Congress' institutional competence as the National Legislature." Metro Broadcasting, 497 U.S. at 563.

decision in Fullilove in deferring to Congress and in applying intermediate scrutiny to Congress' preferential measures.

(Intermediate scrutiny requires that there be an important governmental interest within the power of Congress and that the means chosen be substantially related to the achievement of those objectives.) The Court distinguished City of Richmond v. J.A. Croson, 488 U.S. 469 (1988), on the basis that Croson involved a remedial plan of a local entity rather than of Congress.<sup>7</sup> The Court additionally determined that the means were narrowly tailored to the congressional objective in that Congress had considered and eliminated non-racial alternatives, the measures were limited in extent and duration, and the burden on non-minorities was slight.

The Commission's preference policy as set out in the Notice, including the spectrum set-aside, preferential payment terms, tax certificates and bidding preferences, meets the test applied by the Supreme Court in Metro Broadcasting for the reasons articulated below.

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<sup>7</sup> The Supreme Court in Croson struck down a minority set-aside of construction contracts in public projects. The Court distinguished Fullilove on the basis that a local or state entity did not possess the same remedial power as Congress. The local entity, the Richmond City Council, could justify discrimination based on race only if there existed evidence of past discrimination by that entity.

"... if the city could show that it had essentially become a 'passive' participant in a system of racial exclusion practiced by the elements of the local construction industry, we think it clear that the city could take affirmative steps to dismantle such a system." City of Richmond v. J.A. Croson, 488 U.S. 469, 492 (1988).



1. The Commission's Preferential Treatment of Minorities and Women is Substantially Related to the Valid Congressional Objective of Promoting Economic Opportunity

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The promotion of economic opportunity for historically disadvantaged groups was held in Fullilove to be a valid congressional objective. Implicit in the objective of promoting economic opportunity for minorities and women is the desire to remedy past and continuing discrimination against those disadvantaged groups.

Fullilove involved an equal protection challenge to a set-aside for minority group members in federally funded local public works projects. The Court, in upholding the validity of the set-aside, declined to apply strict scrutiny to the minority preference, but rather formulated an intermediate level of scrutiny. The Court accorded a great deal of deference to Congress and its broad remedial powers, and analyzed the legislative history to determine whether there was a rational basis for Congress to decide that minority access to subcontracting opportunities had been impeded. The Court determined that Congress required the set-aside as a strictly remedial measure for past discrimination against minorities in public contracting and that there was a sufficient history of preclusion of minority business in public contracting opportunities to warrant preferential treatment.<sup>8</sup> Additionally,

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<sup>8</sup> "... we are satisfied that Congress had abundant historical basis from which it could conclude that traditional procurement practices, when applied to minority businesses, could perpetuate the effects of prior discrimination." Fullilove, 448 U.S. at 478.

the Court determined that the means were narrowly tailored to fulfill the governmental objective in that the contracting procedures included provisions for waivers and exemptions to the set-aside,<sup>9</sup> and the impact on non-minorities was minimal.<sup>10</sup>

Minorities and women have been precluded from participation in the communications industry as a result of discriminatory barriers, much in the same way as the minority contractors in Fullilove. The Report of The FCC Small Business Advisory Committee Regarding Gen Docket 90-314, dated September 15, 1993, documents the barriers to participation by minorities and women

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<sup>9</sup> National Association of Minority Telecommunications Executives and Companies ("NAMTEC") expresses concern that the Commission's preference requires safeguards such as the exemption and waiver provisions in Fullilove in order to assure its constitutionality. See NAMTEC Comments at 13. IPR fully supports such safeguards to ensure that the preference is substantially related to the governmental objective.

<sup>10</sup> "It is not a constitutional defect in this program that it may disappoint the expectations of nonminority firms. When effectuating a limited and properly tailored remedy to cure the effects of prior discrimination, such 'a sharing of the burden' by innocent parties is not impermissible." Fullilove, 448 U.S. at 484 (opinion of Burger, C.J.) (citation omitted). The set-aside proposed in the Notice would allocate to the Designated Entities one 20 MHz block and one 10 MHz block in the broadband PCS, the total allocation of which equals 160 MHz. In addition to the broadband PCS, the Commission proposes to allocate licenses in the narrowband PCS which is not subject to the preferences for Designated Entities. The allocation of 30 MHz to Designated Entities would have only minimal impact on nonminorities because the set-aside is not reserved solely for minorities and women, but includes potentially nonminority entities, i.e., small businesses and rural telephone companies. Additionally, the set-aside constitutes less than twenty percent of the total allocation in the broadband PCS service, which does not include the allocation in narrowband PCS.

in the communications industry.<sup>11</sup> Additionally, the Court in Metro Broadcasting acknowledged that "Congress has consistently recognized the barriers encountered by minorities in entering the broadcast industry,"<sup>12</sup> and the courts have deferred to congressional factfinding in the context of racial preferences. The Fullilove Court decided that in the construction contract context,

Congress had abundant evidence from which it could conclude that minority businesses have been denied effective participation in the public contracting opportunities by procurement practices that perpetuated the effects of prior discrimination. Congress, of course, may legislate without compiling the kind of 'record' appropriate with respect to judicial or administrative proceedings.<sup>13</sup>

Similarly in the context of PCS license allocation, as with broadcast licenses, the historical barriers to the communications industry are well documented. A court reviewing the proposed PCS preferences would therefore find Congress was serving a valid and important governmental interest in promoting economic opportunity

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<sup>11</sup> "Women and members of minority groups have encountered special barriers to telecommunications ownership." Report of the FCC Small Business Advisory Committee Regarding Gen Docket 90-314 ("SBAC Report") at 3.

See also, Windsong Communications, Inc. Comments; The Minority PCS Coalition Comments; Palmer Communications Incorporated Comments; Alliance Telecom, Inc. Comments.

<sup>12</sup> "The 'special attribute [of Congress] as a legislative body lies in its broader mission to investigate and consider all facts and opinions that may be relevant to the resolution of an issue. One appropriate source is the information and expertise that Congress acquires in the consideration and enactment of earlier legislation.'" Metro Broadcasting, 497 U.S. at 572 (citation omitted).

<sup>13</sup> Fullilove, 448 U.S. at 478 (opinion of Burger, C.J.).

and competition for businesses owned by minorities and women.<sup>14</sup>

Further, the particular form of preferential treatment proposed by the Commission in the Notice is substantially related to Congress' objectives of promoting economic opportunity for minorities and women. In assessing the validity of the means chosen by Congress, the Fullilove Court deferred to Congress' remedial powers, considered the impact on non-preferred entities and assessed whether the preference was overinclusive; i.e. whether the preference gave incidental advantages to parties who were not intended to receive preferential treatment.

The system of preferences proposed for PCS meets the foregoing standards. Both Congress and the Commission have had substantial experience in formulating minority preferences<sup>15</sup> and therefore have the requisite knowledge to tailor effective preferences for the issuance of PCS licenses. Providing the set-aside spectrum for Designated Entities ensures that qualified Designated Entities will receive PCS licenses. Furthermore, the other preferential mechanisms contemplated by the Notice - preferential payment terms, tax certificates and bidding preferences - would allow minorities and women, who have been historically disadvantaged in their access to capital markets,<sup>16</sup>

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<sup>14</sup> See SBAC Report.

<sup>15</sup> "Through these and other examination of the lack of opportunities for minority-owned enterprise, Congress has developed an institutional expertise on the issue of minority opportunities." NAMTEC Comments at 11.

<sup>16</sup> See SBAC Report.

to participate effectively in the competitive bidding for PCS licenses. The means proposed by the Commission are not only substantially related to the objective of promoting economic opportunity for minorities and women, but directly accomplish Congress' mandate.

2. The Commission's Preferential Treatment of Minorities and Women is Substantially Related to the Valid Congressional Objective of Promoting Diversity of Ownership and Viewpoints

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The proposed system of preferences not only furthers the governmental interest in promoting economic opportunity for minorities and women, but also furthers a separate interest in promoting diversity in the media. The promotion of diversity in programming in the broadcasting context has been held to be an important governmental interest justifying preferential treatment of designated groups.<sup>17</sup> Although the initial competitive bidding for PCS licenses will be for uses analogous to common carrier services, the rules promulgated by the Commission will be used as a basis for future competitive bidding for other services where the licensee exercises control over the information transmitted. Further, PCS itself has potential for such uses.

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<sup>17</sup> "Congress found that 'the effects of past inequities stemming from racial and ethnic discrimination have resulted in a severe underrepresentation of minorities in the media of mass communications.'" Metro Broadcasting, 497 U.S. at 566 (citation omitted).

"Safeguarding the public's right to receive a diversity of views and information over the airwaves is therefore an integral component of the FCC's mission." Metro Broadcasting, 497 U.S. at 567.

If the initial licensees were to be permitted to develop and utilize that potential, assuring the inclusion of minorities in the allocation of PCS licenses would be essential to fulfill the Commission's goal of "safeguarding the public's right to receive a diversity of views and information".<sup>18</sup> The Court in Metro Broadcasting, as discussed above, deferred to the expertise of the Commission and the factfinding of Congress in assessing the nexus between increased minority participation in broadcasting and diversity of programming.<sup>19</sup> The diversity concerns in the allocation of broadcast licenses in Metro Broadcasting exist also with PCS technology. The preferential treatment of minorities in the allocation of spectrum for PCS is substantially related, as were the preferences in Metro Broadcasting, to the goal of diversity of ownership and viewpoints.

Similarly, Congress and by extension the Commission, in mandating the inclusion of women in its definition of Designated Entities, is pursuing the valid and important governmental interest of promoting diversity of ownership and viewpoints. Such diversity was held in Metro Broadcasting to be a

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<sup>18</sup> Id.

<sup>19</sup> "The FCC's conclusion that there is an empirical nexus between minority ownership and broadcasting diversity is a product of its expertise, and we accord its judgment deference." Metro Broadcasting, 497 U.S. at 570.

"For the past two decades, Congress has consistently recognized the barriers encountered by minorities in entering the broadcast industry and has expressed emphatic support for the Commission's attempts to promote programming diversity by increasing minority ownership." Metro Broadcasting, 497 U.S. at 572.

sufficiently important governmental interest to justify preferential treatment of historically disadvantaged groups. Congress has specifically found that expanding female ownership "results in diversity of programming and improved service to minority and women audiences," and has "explicitly approved" the use of preferences to help reach that goal.<sup>20</sup> Because of the potential use of PCS technology for communication of what is essentially programming, assuring the inclusion of women in the allocation of PCS licenses is important to secure their contribution to the diversity of viewpoints.

In Lamprecht v. FCC, 958 F.2d 382 (D.C. Cir. 1992), the D.C. Circuit acknowledged that the "promotion of diversity of viewpoints in general qualifie[d] as an 'important' objective within the government's power".<sup>21</sup> That case involved a gender-based preference in the grant of construction permits and operation licenses for radio and television. The court applied intermediate scrutiny - "requir[ing] not only that sex-based generalizations must be 'supported' but that the support be

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<sup>20</sup> S. Rep. No. 100-182, 100th Cong., 1st Sess. 76 (1987) (quoted in Metro Broadcasting, 497 U.S. at 578; See also Minority Ownership of Broadcast Stations: Hearing Before the Subcomm. on Communications of the Senate Comm. on Commerce, 101st Cong, 1st Sess. at 3 (1989) (statement of Sen. Hollings); 135 Cong. Rec. H7644 (daily ed. Oct. 26, 1989) (banning expenditure of funds to weaken the policy); H.R. Rep. No. 97-765 (Conf. Rep.) 97th Cong., 2d Sess. 43 (1982), reprinted in 1982 U.S.C.C.A.N. 2288-89 (permitting lotteries) (women "significantly underrepresented" in license ownership; preferences needed to ensure "wider diversity of information sources").

<sup>21</sup> Lamprecht, 958 F.2d 382, 391 (D.C. Cir. 1992) (citation omitted).

strong enough to advance 'substantially' the legitimating governmental interest".<sup>22</sup> The court found that the empirical evidence, relying on a single study,<sup>23</sup> was insufficient to establish a link between women's ownership of radio and television stations and programming. As a result, the preference for women was deemed to be unconstitutional.

The opinion in Lamprecht did not evaluate whether the female preference does in fact foster diversity of programming. Instead, it focused on whether the preference resulted in programming narrowly targeted at women.<sup>24</sup> While "th[is] distinct type of programming" may represent one aspect of "diversity of viewpoints in general", it was never intended to supplant the Commission's actual, and far broader, goal of viewpoint diversity.<sup>25</sup> By requiring a quantifiable nexus

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<sup>22</sup> Id. at 393.

<sup>23</sup> Congressional Research Service, Minority Broadcast Station Ownership and Broadcast Programming: Is There a Nexus? 12 (1988).

<sup>24</sup> "Implicit in the government's judgment are at least three assumptions: first, that there exists such a thing as 'women's programming'...; second, that these distinct types of programming are underrepresented on the airwaves; and third, that women who own radio or television stations are likelier than white men to broadcast these distinct types of programming." Lamprecht, 958 F.2d at 395.

<sup>25</sup> See Minority Ownership of Broadcast Stations: Hearing Before the Subcomm. on Communications of the Senate Comm. on Commerce, Science and Transp., 101st Cong., 1st Sess. 78 (1989) (Commission representative testified that no specific definition of "female programming" was necessary because "[t]he purpose of the female preference is to increase female ownership in order to promote viewpoint diversity."). See also 135 Cong. Rec. H7644 (daily ed. Oct. 26, 1989) (discussing appropriations rider); 135 Cong. Rec. S12, 265 (daily ed. Sept. 29, 1989) (same) (intent to improve service to all audiences, including female and minority groups);



between the gender preference and "women's programming", the D.C. Circuit went beyond what either Congress or the Commission had sought to achieve with the gender preference.

Nevertheless, Lamprecht does not bar the Commission from providing a preference for women, and does not force it to prove a statistical link between female ownership and some fixed amount of "women's programming" to do so. Instead, the Commission need only clarify the permissible objective of the policy - that is, to increase overall diversity - and establish a factual record demonstrating that the preference bears a substantial relationship to achieving that goal. Numerous studies support the conclusion of Congress and the Supreme Court that there is a nexus between ownership and diversity, and that the nexus is no less true for female licensees than for men of color. Therefore, increased female ownership of PCS licenses will result in increased diversity in ownership and viewpoints across the board. The proposed preference for women will foster diversity in ownership and viewpoints with regard to PCS technology in precisely the same manner as with minority preferences.

#### **CONCLUSION**

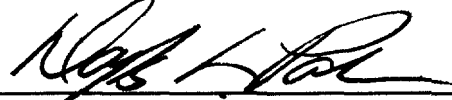
For the above reasons, we strongly urge the Commission to adopt the preferences set forth in the Notice for minorities and women in the allocation of PCS licenses. We also urge that the

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Matthew L. Spritzer, Justifying Minority Preference in Broadcasting, 64 S. Cal. L. Rev. 293, 330 (1991) (discussing Congressional intent).

Commission utilize appropriate safeguards to assure a substantial relation between the preferential measures and the governmental objectives - to promote economic opportunity for minorities and women, to remedy past and continued discrimination against minorities and women in the communications industry, and to promote diversity of ownership and viewpoints.

Respectfully submitted,



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November 24, 1993



**American Personal  
Communications**

## **Press Release**

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For Immediate Release

July 22, 1993

### **American Personal Communications Demonstrates Electronic Washington Post, Personal Communications Services At White House Exhibition**

WASHINGTON -- American Personal Communications (APC) today demonstrated for President Clinton a prototype of an interactive electronic version of The Washington Post that will be deliverable to subscribers via Personal Communications Services (PCS) technology.

Katharine Graham, chairman of The Washington Post Company, a partner in APC, and APC chairman Wayne Schelle introduced the new multimedia format, called PostCard™, at a White House exhibition of wireless technologies attended by the President and Vice President Gore.

APC also demonstrated a PCS network operating in the 1850-1990 Megahertz radio band using a Qualcomm base station. When deployed commercially, PCS will apply advanced digital technology to a wide variety of wireless telecommunications devices, ranging from tiny portable phones to high-capacity, high-speed wireless computers and personal digital assistants. PCS devices and services are designed to be accessible at affordable prices to all segments of the public.

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APC has been operating experimental PCS systems in Washington, northern Virginia and the Baltimore region since November 1991. In October 1992, APC received a tentative pioneer's preference for PCS from the FCC.

APC chairman Schelle pointed out: "A nationwide PCS industry could attract 60 million customers in its first ten years, creating 300,000 new jobs and \$200 billion in annual revenue, according to estimates made by Motorola. These estimates assume the FCC will award licensees sufficient radio spectrum and market size to develop and offer high-capacity, wide-area services."

"With emerging technologies like PCS, electronic newspapers no longer belong to the realm of science fiction," said Mrs. Graham. "PostCard™ offers the prospect of adding the multimedia power of the computer to the traditional newspaper, making possible a wide range of interactive services in a completely portable package."

"PCS technology will enable the newspaper to become a living, changing document that will combine the immediacy of television with the depth, power and convenience of the written word," said Schelle. "Most importantly, PCS networks will make applications like PostCard™ available to the public when and where their need for information arises, whether at home, in the school or office, or while traveling."

PostCard™ could be delivered to subscribers via wireless PCS networks, as well as by computer, cable and the electronic superhighway of the future.

Instead of just being able to read stories, PostCard™ subscribers would be able to see and hear video and audio clips about the story, interact with personalized graphics and simulations, order "Tell Me More" news, customize news to their interests, obtain news updates throughout the day, participate in electronic "chats" with other readers, listen to "review your own" music clips, electronically purchase items from advertisements, and even have the computer read stories to them.

PostCard™ taps PCS technology to provide these features in a package that is designed to be as portable and easy to use as a traditional newspaper. At the White House exhibition, PostCard™ was demonstrated on an Apple PowerBook® as well as a larger television monitor.

PCS Action, an association of companies committed to bringing PCS services to a mass market quickly and inexpensively, is urging federal policy makers to award PCS licenses of 40 megahertz of radio spectrum each, within the 1850-1990 megahertz spectrum band already designated for PCS use by the FCC.

This band of spectrum will be the first to be auctioned by the federal government under new competitive bidding procedures being finalized by Congress as part of President Clinton's budget package.

In addition to The Washington Post Company and APC, members of PCS Action are Associated Communications, Cox Enterprises, Crown Media, MCI, Motorola, Northern Telecom, Omnipoint, Providence Journal Company, Qualcomm, Times Mirror Cable Television and Time Warner Telecommunications.

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